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No. 81-333

In The

Supreme Court of the United States

OCTOBER TERM, 1981

BECHTEL POWER CORPORATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE PETITIONER BECHTEL POWER CORPORATION

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QUESTIONS PRESENTED

1. Can an employer be held liable for employment discrimination under 42 U.S.C. § 1981 absent a finding that the employer acted with an intent to discriminate?

2. Does an employer violate 42 U.S.C. § 1981 by the mere acceptance of workers from a discriminatorily-operated union hiring hall without regard to whether the employer knew, or should have known, of the union's discrimination and without regard to whether such union discrimination, in fact, had an adverse impact on the composition of that employer's work-force?

3. Can a class of 1,400 individual employers be held vicariously liable under 42 U.S.C. § 1981 solely by reason of a union's intentional discrimination in the operation of its hiring hall, where the district court found that: (1) the employers were required to use the hiring hall by the terms of their collective bargaining agreements, (2) the hiring hall provisions set forth in the agreements were nondiscriminatory on their face, (3) there was no evidence that the employers knew, or should have known, of the discrimination being practiced by the union, and (4) the hiring hall was operated under the exclusive control of the union?

4. Did the court below properly enter a broad mandatory injunction, including minority employment quotas, against each of 1,400 employers without affording them an opportunity to present their individual defenses or individual employment statistics?

5. Was a defendant class of 1400 employers properly certified under subdivisions (a) and (b)(2) of Federal Rule of Civil Procedure 23?

6. Did the district court secure *in personam* jurisdiction over 1,400 unnamed members of a defendant class through the device of a defendant class action?

THE PARTIES

The findings and conclusions of the district court spawned several appeals, which were consolidated before the court of appeals. The two judgments of the court of appeals, in turn, resulted in five petitions for certiorari, which this Court has granted and consolidated. The parties, and their status in the proceedings, are:

Plaintiff-Appellees Below

(a) the Commonwealth of Pennsylvania, and

(b) twelve black operating engineers, as individuals and class representatives of approximately 1,000 black operating engineers.

These parties are respondents before this Court.

Named Defendant-Appellants Below

(a) Local 542, International Union of Operating Engineers, AFL-CIO (not a petitioner to this Court);

(b) the Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania, and the State of Delaware (not a petitioner to this Court);

(c) the Contractors Association of Eastern Pennsylvania and United Contractors Association (petitioners in 81-331), the General Building Contractors Association (petitioner in 81-280), and the Pennsylvania Excavating Contractors Association (now defunct), individually and as class representatives;

(d) Glasgow, Inc. (petitioner in 81-332), individually and as class representative of approximately 1,400 employer-contractors.

Nonparty-Appellants Below

Two unnamed members of the defendant-employer class:

(a) United Engineers & Contructors Inc. (petitioner in 81-330); and

(b) Bechtel Power Corporation (petitioner here in 81-333).*

*No changes have occurred in Bechtel Power Corporation's corporate affiliations, set forth at p. iii of its Petition for Writ of Certioriari.

TABLE OF CONTENTS

	Page
Questions Presented	*i*
The Parties	*ii*
Table of Authorities	*vii*
Opinions Below	1
District Court	1
Court of Appeals	2
Statement of Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	3
The Hiring Hall Requirement	3
The Lawsuit	5
The District Court's Decision on Liability	6
The Stage I Decree	7
The Judgment of the Court of Appeals	8
Summary of Argument	9
The District Court Erroneously Interpreted § 1981	9
The District Court Erred in Imposing Vicarious Liability	10
The District Court Improperly Utilized The Defendant Class Action Device	11

Page

ARGUMENT

I. — 42 U.S.C. § 1981 imposes liability only for acts of intentional discrimination, and the courts below erred in failing to apply this standard..... 13

A. *Since This Court's Decision In* Washington v. Davis, *The Circuit Courts of Appeals Have Unanimously Adopted The View That § 1981 Requires Proof Of Discriminatory Intent*..... 14

B. *The Constitutional Origin And Historical Context of § 1981 Support The Conclusion That § 1981 Proscribes Only Intentional Discrimination*... 16

C. *Section 1981 Is Separate, Distinct And Independent From Title VII And Title VII Standards Should Not Be Superimposed Onto Section 1981*..... 19

D. *Present Day Interpretation Of § 1981 And The Reconstruction Statutes Requires Adoption Of An Intent Standard*..... 22

II. — The courts below erroneously substituted a vicarious liability standard of proof for the proper standard of intentional discrimination..... 25

A. *Imposition of Vicarious Liability Is Contrary To Prior Employment Discrimination Cases*..... 26

B. *The Cases Arising Under The National Labor Relations Act Do Not Support The Imposition Of Vicarious Liability*..... 28

C. *The Common Law Doctrine of* Respondeat Superior *Does Not Apply To The Circumstances Of This Case*..... 29

Page

D. *The Imposition Of Vicarious Liability Under The Circumstances Of This Case Jeopardizes The Stability Of Collective Bargaining Throughout The Construction Industry* 31

III. — By imposing classwide vicarious liability, the district court erroneously created for § 1981 a lower threshold of liability than exists for Title VII. 33

IV. — The defendant-employer class was improperly certified. 35

A. *The Commonality And Typicality Requirements of Rule 23(a) Were Not Satisfied* 36

B. *Conflicts Between The Designated Class Representative And The Absent Class Members Render Class Certification Improper.* 37

C. *The Defendant-Employer Class Was Improperly Certified Under Rule 23(b)(2).* 38

V. — A defendant class action does not confer upon the district court personal jurisdiction over absent class members; therefore, the mandatory obligations of the decree must be vacated as to the absent class members 39

CONCLUSION 42

ADDENDUM

Statutory Provisions and Rules Involved A-1

TABLE OF AUTHORITIES

Cases:	Page
Allen v. Pipefitters Local Union No. 208, 56 F.R.D. 473 (D. Colo. 1972)	26
Carey v. Greyhound Bus Co., 500 F.2d 1372 (5th Cir. 1974)	27
Chicano Police Officers Association v. Stover, 552 F.2d 918 (10th Cir. 1977)	15
Christopher v. Brusselback, 302 U.S. 500 (1938)	40
City of Los Angeles, Department of Water and Power v. Manhart, 435 U.S. 702 (1978)	33
City of Memphis v. Greene, ___ U.S. ___, 49 U.S.L.W. 3931 (April 20, 1981), *rehearing denied*, ___ U.S. ___, 49 U.S.L.W. 4359 (June 15, 1981)	23
Cody v. Union Electric Co., 518 F.2d 978 (8th Cir. 1975)	22
Craig v. County of Los Angeles, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S.Ct. 1364 (1981)	15
Croker v. Boeing Co., ___ F.2d ___, 26 F.E.P. Cases 1569 (3rd Cir. 1981)	14, 19
Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979)	15, 18, 21
Des Vergnes v. Seekonk Water District, 601 F.2d 9 (1st Cir. 1979)	15
Detroit Police Officers Association v. Young, 608 F.2d 671 (6th Cir. 1979)	15
Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978)	15

Page

Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485 (S.D.N.Y. 1973) 41

East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395 (1977) 37

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 35

Furnco Construction Co. v. Waters, 438 U.S. 567 (1978) 28, 34

Golden v. Local 55, International Association of Firefighters, 633 F.2d 817 (9th Cir. 1980) 15

Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973) 41

Grier v. Special Skills, Inc., 326 F. Supp. 856 (W.D.N.C. 1971) 22

Griffin v. Breckinridge, 403 U.S. 88 (1971) 17, 24

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 14, 21, 34

Guardians Association v. Civil Service Commission, 633 F.2d 232 (2d Cir. 1980) 14, 15, 19, 22, 23

Hansberry v. Lee, 311 U.S. 32 (1940) 39

Hills v. Gautreaux, 425 U.S. 284 (1976) 22

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 27, 33, 34

Jennings v. Patterson, 488 F.2d 436 (5th Cir. 1974) 22

Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974) 27

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 14, 16, 19, 20, 21, 22

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) . 17, 22, 24

Kinsey v. First Regional Securities, Inc., 557 F.2d 830 (D.C. Cir. 1977) 15

Page

Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) 36

Lummus Co. v. NLRB, 339 F.2d 728 (D.C. Cir. 1964).. 29, 31

Mahone v. Waddle, 564 F.2d 1018 (3rd Cir. 1977)..... 18

McFadden v. Baltimore Steamship Trade Association, 8 F.E.P. Cases 391 (D. Md. 1972)..... 26

Mescall v. Burrus, 603 F.2d 1266 (7th Cir. 1979) 15

Morrison-Knudsen Co., Inc. v. NLRB, 275 F.2d 914 (2d Cir. 1960), *cert. denied*, 366 U.S. 909 (1961)..... 28

Myers v. Gilman Paper Corp., 544 F.2d 837 (5th Cir), *cert. dismissed*, 434 U.S. 801 (1977)..... 27

NLRB v. H.K. Ferguson Co., 337 F.2d 205 (5th Cir. 1964), *cert. denied*, 380 U.S. 912 (1965) 28

NLRB v. Master Stevedores Association of Texas, 418 F.2d 140 (5th Cir. 1969).. 29

NLRB v. United States Steel Corp., 278 F.2d 896 (3rd Cir. 1960) *(en banc), cert. denied*, 366 U.S. 908 (1961) 28, 29

Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974)..... 22

Ortego v. Merit Insurance Co., 433 F. Supp. 135 (N.D. Ill. 1977) 22

Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980) *(en banc)* 38

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 25

Robinson v. Lorillard, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)..... 27

Runyon v. McCrary, 427 U.S. 160 (1976) 16, 21, 24

Page

Tillman v. Wheaton-Haven Recreation Association, Inc., 410 U.S. 431 (1973) 14

United States v. Medical Society of South Carolina, 298 F. Supp. 145 (D. S.C. 1969) 22

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 19

Vogler v. McCarty, Inc., 294 F. Supp. 368 (E.D. La. 1968), *aff'd sub. nom., Heat & Frost Insulators and Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) 26

Washington v. Davis, 426 U.S. 229 (1976) 10, 14, 18, 22, 23

Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975) 37

Williams v. DeKalb County, 582 F.2d 2 (5th Cir. 1978) . 15

Constitution and Statutes:

United States Constitution:

Thirteenth Amendment 10, 16, 17, 18

Fourteenth Amendment 10, 14, 16, 17, 18, 23, 25

28 U.S.C. § 1254(1) 2

29 U.S.C. § 158(a)(3) 28

42 U.S.C. § 1981 ..... *passim*

42 U.S.C. § 1982 ..... 22, 23, 25

42 U.S.C. § 1985(3) 6, 7, 17, 24, 25

42 U.S.C. § 2000e et. seq, Title VII of the Civil Rights Act of 1964 ..... 5, 10, 13, 14, 15, 20, 21, 22, 33, 34, 35

Page

Enforcement Act of 1870, Ch. 114, 16 Stat. 140. . . . . 10, 17, 18, 21

Rules and Regulations:

Fed. R. Civ. P. 23(a) 11, 35, 36, 37

Fed. R. Civ. P. 23(b) 11, 35, 38, 39

Articles and Treatises:

Bastress, *Application of a Constitutionally-Based Duty of Fair Representation to Union Hiring Halls,* 82 W. Va. L. Rev. 31 34

Bourton and Levitt, *Union and Open Shop Construction* 34

Brest, *The Supreme Court, 1975 Term — Forward: In Defense of the Antidiscrimination Principle,* 90 Harv. L. Rev. 1 (1976) 21

Heiser, *Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination Under 42 U.S.C. § 1981,* 16 San Diego L. Rev. 207 (1979) 16, 18, 19

Note, *Burden of Proof in Racial Discrimination Actions Brought Under the Civil Rights Acts of 1866 and 1870: Disproportionate Impact or Discriminatory Purpose?,* 1978 Brigham Young L. Rev. 1030 . . . . . 16, 21

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U.S. Dep't of Labor, *Annual Construction Industry Report (April 1981)* 32

Restatement (Second) of Agency 30

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OPINIONS BELOW

District Court

The opinion of the District Court for the Eastern District of Pennsylvania, which includes findings of fact and conclusions of law on issues of liability, is reported at 469 F.Supp. 329 (PA 9).[1] The district court entered a separate Judgment and Decree, which is not reported (PA 228); the Supplemental Opinion filed with the decree, however, is reported at 488 F.Supp. 988 (PA 213).

[1]Material printed in the appendix filed with Bechtel Power Corporation's Petition shall be referred to as "PA" followed by the page number. Material printed in the joint appendix filed with this Brief in accordance with Rule 30 shall be referred to as "JA" followed by the page number.

Court of Appeals

A panel of the Third Circuit Court of Appeals heard argument in the consolidated appeals; but, before the panel issued its decision, the court ordered reargument *en banc*. Following the reargument, an evenly divided court of appeals affirmed the judgment of the district court in an opinion reported at 648 F.2d 923, which is the subject of this petition. The court also affirmed the judgment of the district court with respect to the liability of Local 542, International Union of Operating Engineers, and the Local 542 Joint Apprenticeship and Training Committee, in an opinion reported at 648 F.2d 922.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the Third Circuit Court of Appeals (PA 1) was entered May 19, 1981. Bechtel's petition for a writ of certiorari was filed on August 17, 1981, within ninety days of the entry of judgment by the court of appeals, and was granted by this Court on October 19, 1981.

STATUTORY PROVISIONS INVOLVED

The issues raised by this petition involve interpretation and application of the following statutes and rules:

42 U.S.C. §1981

Federal Rules of Civil Procedure 23(a) and 23(b)

The text of each is set forth in the Addendum which appears at the end of this brief. The Addendum also sets forth the language of:

Civil Rights Act of 1866, §1

Fourteenth Amendment, §1

Enforcement Act of 1870, §16 and §18

42 U.S.C. §1982

STATEMENT OF THE CASE

Pursuant to a writ of certiorari granted by this Court, Bechtel Power Corporation ("Bechtel") in this case (No. 81-333, consolidated with Nos. 81-280, 81-330, 81-331 and 81-332) seeks review of a *per curiam* decision of the Third Circuit Court of Appeals affirming, by an evenly divided court,[2] a judgment and decree entered by the District Court for the Eastern District of Pennsylvania (Circuit Judge Higginbotham, sitting by designation) which:

(1) certified a defendant class of over 1400 employers,

(2) held the members of the defendant class vicariously liable under 42 U.S.C. §1981 for a labor union's intentional acts of race discrimination, and

(3) subjected the 1400 individual employers to an extensive mandatory injunction, including minority employment "goals".

Although this litigation has stretched over some 10 years and has generated a voluminous record, the facts essential to this appeal are few, straightforward, and largely uncontroverted.

The Hiring Hall Requirement

Local 542 of the International Union of Operating Engineers ("Local 542" or "the Union") has a geographical jurisdiction which includes the eastern half of Pennsylvania and the State of Delaware (PA 28). Local contractors working in that area on a union basis generally enter into collective bargaining agreements directly with Local 542. Some local contractors (perhaps 20% of the defendant-employer class) have formed local contractor associations which negotiate with Local 542 on behalf of their members (PA 29). National contractors, such as Bechtel, generally negotiate national labor agreements with the

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[2]Chief Judge Seitz and Judges Aldisert, Gibbons, Hunter, Weis, and Garth sitting; Judges Rosenn, Adams, Sloviter, and Higginbotham did not participate.

international construction trades unions. These national agreements typically incorporate local labor standards (including hiring halls, where they exist), but the national contractor may never negotiate directly with the local union or, indeed, even be signatory to a contract with the local union.[3]

During 1961 labor contract negotiations, Local 542 conducted a ten week strike to force the local contractor associations to agree to an exclusive hiring hall provision in their area collective bargaining agreement (PA 23). A second strike occurred in 1963 when the contractor associations unsuccessfully sought to remove the hiring hall requirement from the area labor contract (JA 310). Since that time, all contractors who perform work on a union basis within the expansive jurisdiction of Local 542 have been contractually required to utilize Local 542's hiring hall when employing operating engineers.

The particular hiring hall requirement negotiated by Local 542, and binding on all contractors performing work on a union basis within Local 542's jurisdiction, was specifically found by the district court to be lawful and nondiscriminatory on its face (PA 30), and was administered solely by Local 542. A system of referral lists was created, and an employer bound by the hiring hall agreement is required to select its operating engineers from among those referred by the Local 542 hiring hall (PA 24-26). The employer retains control over terminations, and has a limited right to recall an employee laid off within 90 days (PA 26).

The Local 542 hiring hall, use of which was required by contract, is the focal point of the present litigation.

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[3]The district court opinion did not discuss the manner in which national contractors operate. It found "no distinction between national and local contractors" (PA 202).

The Lawsuit

This action was filed in the district court in 1971; the principal allegation being that Local 542 had operated its hiring hall in a racially discriminatory manner. Plaintiffs were the Commonwealth of Pennsylvania, as *parens patriae,* and twelve individual black operating engineers, thereafter certified as representatives of a class of over one thousand minority persons residing within Local 542's jurisdiction (PA 17, 144-145).

The named defendants were (1) Local 542, (2) the Operating Engineers Joint Apprenticeship and Training Committee ("JATC"), (3) four employer associations ("the associations"),[4] and (4) a single contractor, Glasgow, Inc. ("Glasgow"). Glasgow was certified as the representative of "all employers who have been parties to a collective bargaining agreement with Local 542 and who hired at least one operating engineer affiliated with Local 542" during the relevant limitations period (PA 200). The district court estimated that there were approximately 1400 members of this defendant-employer subclass (PA 14). Certification of this class was based, in part, on the district court's conclusion that it was not necessary, under 42 U.S.C. §1981, to inquire into either the intent or the workforce statistics of the individual employers. (PA 201-202, 212). Bechtel is one of the unnamed members of the defendant-employer class, and was never served with process nor did it participate in the district court trial.

In the complaint, Local 542 and JATC were alleged to have violated both Title VII of the Civil Rights Act of 1964, 42

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[4]The associations were certified as representatives of a defendant subclass of all employer associations which had been parties to a collective bargaining agreement with Local 542 during the appropriate limitations period. This brief is not directed to issues concerning the subclass of employer associations. References herein to the "defendant class" or "defendant-employer class" refer to the employer subclass and not the association subclass.

U.S.C. §2000e *et seq.* ("Title VII"), and 42 U.S.C. §1981 ("§1981"). The complaint did not allege a Title VII cause of action against the defendant-employer class, presumably because Title VII's administrative prerequisites had not been met as to the class. In dealing with the potential liability of the defendant-employer class, the district court considered only the alleged §1981 violation, and an alleged conspiracy among the 1400 contractors and Local 542, in claimed violation of 42 U.S.C. §1985(3).

The District Court's Decision on Liability

The district court divided the trial into two stages. Stage I, now complete, addressed issues of liability. Stage II, yet to commence, will resolve issues of damages. At the conclusion of Stage I, the court found that Local 542 and JATC had violated both Title VII and §1981 by intentionally discriminating on the basis of race, both in granting membership within the Union and in making hiring hall referrals to employers. In particular, it found that Local 542 engaged in a series of individual departures from the "out-of-work" lists for the purpose of providing nonminority members with work referrals to which minority members were entitled. These findings were affirmed by the court of appeals, and Bechtel does not challenge them here.

The district court's liability opinion is lengthy, and its findings of fact regarding Local 542, JATC, and the association extensive. Findings related to the employers — and, therefore, to the issues Bechtel raises here — are few. They include findings that:

(1) the hiring hall agreement to which the employers agreed is facially neutral and nondiscriminatory (PA 30);

(2) Local 542's discrimininatory referrals were in derogation of, rather than pursuant to, the hiring hall agreement (PA 120, 186);

(3) the employers did not know, and had no reason to know, of Local 542's discriminatory acts (PA 168, 195, 198); and,

(4) plaintiffs failed to prove that the defendant-employer class acted at any time with discriminatory intent (PA 195).

Significantly, there is no finding that any individual unnamed contractor, much less the class of 1400, engaged in any act of discrimination in selecting employees from referrals, in terminating employees, or in exercising recalls. Nor is there any finding concerning the extent of minority representation in the individual workforce of any unnamed defendant-employer class member.[5]

Despite the foregoing, the district court held that each member of the defendant-employer class was vicariously liable under §1981 for the intentional discrimination of Local 542. The district court expressly held that discriminatory intent was not a necessary element of a cause of action under §1981 (PA 167), although the failure of the plaintiffs to establish such intent was considered fatal to their §1985(3) conspiracy claim (PA 197, 198).

The Stage I Decree

In its Stage I Judgment and Decree ("the decree"), the district court established membership quotas for Local 542 and JATC (PA 236, 244), and required the Union to meet minority quotas in its work referrals to employers (PA 236). The court went on to impose minority employment quotas upon the 1400

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[5]The extensive statistical evidence presented by the plaintiffs related primarily to employment of operating engineers either throughout Local 542's jurisdiction or within District 1 of its jurisdiction. Statistical evidence was also presented with respect to the employment of minorities by the designated class representative, Glasgow. No statistical evidence regarding Bechtel's workforce appears in the record.

employers as well — without regard to the availability of minorities through the hiring hall (PA 241-244, PA 308-314). In addition, each contractor was required to prepare and file monthly reports (PA 248, 314-315), listing employment data for individual minority employees and for its total workforce. Special minority training programs were also required of the employer class (PA 247-248), although no findings were made that the employers, as a class, had previously provided training to nonminorities.

The decree also provided that the costs of its implementation — sending notices, recordkeeping, special master fees — were to be paid by "the defendants" (PA 247, 251). At the time the appeals were filed below, those costs had reached $46,470 (PA 303, 306, 342).[6] The district court allocated these costs among the named defendants (PA 282-286). This order was the subject of an appeal by Glasgow, which argued that implementation costs should be imposed on all absent defendant class members. Bechtel, purportedly represented by Glasgow, was an appellee in that appeal.[7]

The Judgment of the Court of Appeals

Following final amendment of the decree, several parties, including Bechtel, filed timely appeals, which were consolidated. After argument before a panel, reargument *en banc* was ordered; subsequently, on May 19, 1981, the court of appeals issued two judgments. As to the liability of Local 542

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[6]Post Decree Orders 30, 34, and 40, entered subsequent to the commencement of the appeals below, have raised the total assessed costs to $161,882. The decree runs for four more years.

[7]There is still pending in the circuit court an appeal filed by Bechtel (No. 81-1514) which seeks review of a later district court ruling that Glasgow has a right of contribution from Bechtel and other class members with respect to the payment of implementation costs. Class representative Glasgow is an appellee in that appeal.

and JATC, it unanimously affirmed the opinion of the district court. This judgment is not before the Court for review. As to the liability of the defendant-employer class, the court divided evenly, thereby affirming the district court (PA 1, 8). Bechtel seeks reversal of this judgment.

SUMMARY OF ARGUMENT

It may be helpful to first state what issues are not before this Court. The district court made extensive findings as to the conduct of Local 542, and concluded that it engaged in intentional acts of racial discrimination in the administration and operation of its hiring hall; these findings are not challenged here. Nor is there any issue as to whether actions of the defendant-employers manifested a discriminatory intent; the district court specifically found that the employers did not act with discriminatory intent, and the respondents have never challenged that finding.

This petition focuses on narrow but important questions of law concerning the imposition of vicarious liability under §1981 on the 1400 members of the defendant-employer class, based solely on their use of the hiring hall as required by their labor contracts, without knowledge that Local 542 was operating the hiring hall in a discriminatory fashion.

In addition, this petition urges that the certification of the defendant-employer class was both improvidently granted and applied.

The District Court Erroneously Interpreted §1981.

The foundation of the district court's vicarious liability theory is its conclusion of law that a showing of discriminatory intent is not a prerequisite to liability under 42 U.S.C. §1981. This Court has not yet decided whether discriminatory intent is a necessary element of proof under §1981. It has announced, in

Washington v. Davis, 426 U.S. 229 (1976), that discriminatory intent is a necessary element of proof under the Fourteenth Amendment, from which §1981 descends. Since that decision, six circuit courts of appeals have held that discriminatory intent *is* a necessary element of proof under §1981 and no circuit court currently holds to the contrary.

This conclusion is supported by the legislative history of §1981. The language of that section appeared first in the Civil Rights Act of 1866, enacted pursuant to the Thirteenth Amendment, and was reenacted in the Enforcement Act of 1870, grounded on the Fourteenth Amendment. Congressional intent that this statutory provision conform to Fourteenth Amendment standards cannot fairly be ignored. Neither can the broad applicability given to §1981 by modern interpretation, or the substantial distinctions between §1981 and Title VII, under which the "disparate impact" theory of liability has evolved. Each of these considerations supports the conclusion that a showing of discriminatory intent is a prerequisite to the imposition of liability under §1981.

Since the district court found that there was no discriminatory intent on the part of the defendant-employers, it is clear that the court erred in imposing liability on the defendant-contractors.

The District Court Erred In Imposing Vicarious Liability.

Intent, of course, is subjective, and must be determined on an individual basis. If §1981 does, in fact, require a showing of discriminatory intent, the district court erred in holding that each of the defendant-employers was liable, not for *its* intent, but for the separate and independent intent of Local 542.

The district court acknowledged that there was no direct authority for its vicarious liability rationale. The authorities cited as analogous, when examined closely, do not support the

imposition of vicarious liability in this case. The employment discrimination cases upon which the court relied involve collective bargaining agreements which by their terms were discriminatory; here, there was no such finding. The court also relied upon circuit court cases decided under the National Labor Relations Act. In these, as well, no vicarious liability was imposed for union hiring hall discrimination without evidence of employer knowledge or participation; here, the district court found the employers neither knew nor should have known of Local 542's discrimination. Finally, the district court's reliance upon the common law doctrine of *respondeat superior* is misplaced. Plainly, that doctrine, with its key element of control by the "master" over the "servant", is singularly inapplicable to the labor-management relationship.

The District Court Improperly Utilized The Defendant Class Action Device.

Because the district court erred in framing the liability issues before it, it also erred in certifying the defendant-employer class. Intent, for example, is a peculiarly individual question. Business necessity, as a defense under any standard of liability, is an individual question. The degree of utilization of blacks will likewise vary from workforce to workforce. Even under the *respondeat superior* doctrine, the degree of control that an employer may have over the union hiring hall is an individual question. Thus, it is clear that this defendant class did not satisfy the "commonality" and "typicality" requirements of Rule 23(a)(2) and (3). Furthermore, inherent conflicts between the designated class representative and absent class members have resulted in inadequate representation of class interests, leaving Rule 23(a)(4) unsatisfied. Finally, the district court erred as a matter of law in certifying a defendant class under subdivision (b)(2) of Rule 23.

Even if the defendant-employer class was properly certified, however, the district court improperly utilized the defendant class device to impose on absent class members personal liability for compliance with the court's mandatory injunctive decree. This extension of the court's personal jurisdiction to parties not before it and never served with process is unwarranted, and contrary to traditional notions of due process.

For all these reasons, Bechtel respectfully submits that the judgment of the court of appeals should be reversed, and the district court decree vacated insofar as it purports to impose liability on non-party members of the defendant-employer class.[8]

[8]To minimize duplication, Bechtel incorporates by reference the discussion of the vicarious liability and class certification issues which appears in the brief filed by United Engineers & Constructors Inc., petitioner in No. 81-330.

ARGUMENT

POINT I

42 U.S.C. §1981 imposes liability only for acts of intentional discrimination, and the courts below erred in failing to apply this standard.

The district court expressly held that there had been no showing that Bechtel or other members of the defendant class either knew or should have known of the discrimination being practiced by Local 542. Accordingly, it irresistibly follows that neither Bechtel nor other members of the defendant class engaged in intentional or purposeful discrimination. Since the liability of the defendant-employer class is premised solely, and wholly, on a claimed violation of §1981, the core legal question thus presented by these consolidated petitions is whether 42 U.S.C. §1981 requires a plaintiff to prove discriminatory intent on the part of the defendant charged with its violation.

The district court concluded that intent was not required, holding:

> that a §1981 employment discrimination claim may be proven on roughly the same basis as a Title VII claim, including *proof of disparate impact alone.* (PA 167, emphasis added)

This conclusion of law was affirmed by an evenly divided court of appeals. Bechtel contends that it is erroneous. Purposeful discrimination — not mere statistical disparity — must be shown to establish liability under §1981. This conclusion is compelled by the unanimous position now taken by the circuit courts, the legislative history of §1981, the present-day scope of §1981, and the significant distinctions between §1981 and Title VII.

A. *Since This Court's Decision In Washington v. Davis, The Circuit Courts of Appeals Have Unanimously Adopted The View That §1981 Requires Proof of Discriminatory Intent.*

The discussion concerning the evidentiary standard to be applied under §1981 has evolved into a choice between an "intent" standard and an "impact" standard. This bipolar analysis is a product of this Court's decisions in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Washington v. Davis*, 426 U.S. 229 (1976). In *Griggs*, the Court held that a prima facie case under Title VII is established by showing that a facially neutral practice had a disparate impact on the employment of minorities in a particular workforce, without regard to whether discrimination was intended. Because §1981, like Title VII, proscribes private employment discrimination, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), many courts initially extended the Title VII "impact" test to claims brought under §1981.

However, in *Washington v. Davis, supra*, this Court held that proof of discriminatory intent was a necessary element of a cause of action brought under the equal protection clause of the Fourteenth Amendment. This Court and others have recognized the historical nexus between §1981 and the Fourteenth Amendment. See *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431, 439, n. 11 (1973); *Guardians Association v. Civil Service Commission*, 633 F.2d 232, 267 (2d Cir. 1980). Consequently, since the decision in *Washington v. Davis*, each circuit that has considered the issue has held that the constitutional standard of liability governs actions brought under §1981.

Specifically, the Courts of Appeals for the Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits have held that §1981 is violated only by actions taken with an intent to discriminate. *Croker v. Boeing Co.*, ____ F.2d ____, 26 F.E.P. Cases 1569

(3rd Cir. 1981);[9] *Craig v. County of Los Angeles*, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, ____ U.S. ____, 101 S.Ct. 1364 (1981); *Guardians Association v. Civil Service Commission*, 633 F.2d 232, 263-268 (2d Cir. 1980); *Mescall v. Burrus*, 603 F.2d 1266, 1271 (7th Cir. 1979); *Williams v. DeKalb County*, 582 F.2d 2, (5th Cir. 1978); *Chicano Police Officers Association v. Stover*, 552 F.2d 918 (10th Cir. 1977). Three other courts of appeals, not presented directly with the question, have expressed their concurrence with this view. *Detroit Police Officers Association v. Young*, 608 F.2d 671, 692 (6th Cir. 1979); *Des Vergnes v. Seekonk Water District*, 601 F.2d 9, 15-16 (1st Cir. 1979); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978). No circuit court now holds to the contrary.[10]

The district court's authority for adopting the Title VII standard of proof for §1981 actions was the decision in *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977). Subsequent to the district court's decision, *Davis* was vacated as moot by this Court, *Id.*, 440 U.S. 625 (1979), and thus deprived of any precedential value. The Ninth Circuit Court of Appeals thereafter held that the appropriate standard under §1981 was one of intentional discrimination. *Craig v. County of Los Angeles, supra; Golden v. Local 55, International Association of Firefighters*, 633 F.2d 817 (9th Cir. 1980).

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[9]It is ironic in the extreme that the decision in the present case no longer represents the views of even the Third Circuit which decided it. On May 12, 1981, the Third Circuit heard argument in both this case and *Croker, supra*. In this case, with six judges sitting, the court split evenly, affirming the district court's application of an "impact only" standard under § 1981. Thereafter, with nine judges sitting, the court held in *Croker* that §1981 does require proof of discriminatory intent.

[10]Early dicta of the Court of Appeals for the District of Columbia suggested a different view, *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 838, n.22 (D.C. Cir. 1977), but the court has not squarely decided the issue.

Thus, every circuit to have ruled on the issue agrees that purposeful discrimination is required to establish a violation of §1981.

B. ***The Constitutional Origin and Historical Context of §1981 Support the Conclusion That §1981 Proscribes Only Intentional Discrimination.***

Although the legislative history of §1981 has been explored in detail by courts and commentators[11], the judicial exegesis of §1981 has not always followed a straight path. Compare *Johnson v. Railway Express Agency, Inc., supra,* at 459-460, with *Runyon v. McCrary,* 427 U.S. 160, 168, n.8 (1976). However, with this Court's decision in *Runyon,* it is now accepted that §1981 has roots in both the Thirteenth and Fourteenth Amendments.

After ratification of the Thirteenth Amendment in 1865, the Thirty-Ninth Congress passed the Civil Rights Act of 1866.[12] Section 1 of that Act provided:

> . . . citizens, of every race and color, . . . shall have *the same right . . . to make and enforce contracts,* to sue, be parties, and give evidence . . . and to full and *equal benefit of all laws and proceedings* for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties,

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[11] See Heiser, *Intent v. Impact: The Standard of Proof Necessary To Establish A Prima Facie Case of Race Discrimination Under 42 U.S.C. § 1981,* 16 San Diego L. Rev. 207 (1979) (cited hereafter as Heiser, *Intent v. Impact*); Note, *Burden of Proof in Racial Discrimination Actions Brought Under the Civil Rights Acts of 1866 and 1870,* 1978 Brigham Young L. Rev. 1030 (cited hereafter as *Burden of Proof*); Note, *Racially Disproportionate Impact of Facially Neutral Practices — What Approach Under 42 U.S.C. Sections 1981 and 1982?,* 1977 Duke L.J. 1267 (cited hereafter as *Racially Disproportionate Impact*).

[12] Act of April 9, 1866, Ch. 31, 14 Stat. 27 (referred to hereafter as "the 1866 Act").

> and to none other, any law, statute, ordinance,, regulation, or custom, to the contrary notwithstanding. (Emphasis added).

The Fourteenth Amendment, with its guarantee of equal protection of the laws, was ratified in 1870; pursuant to §5 of the Amendment, the Forty-first Congress passed the Enforcement Act of 1870.[13] To quell contemporaneous doubts that the Thirteenth Amendment was sufficient basis for the 1866 Act, Congress explicitly reenacted the 1866 Act in §18 of the 1870 Act, pursuant to its enforcement power under the Fourteenth Amendment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968). In addition, §16 of the 1870 Act consists of a virtually *verbatim* repetition of the "right to contract" language in the 1866 Act. Thus, the language now codified as §1981 derives from both the 1866 Act and the 1870 Act.[14]

It was the view of the district court that §1981 was enacted pursuant to the Thirteenth Amendment, and "simply reenacted" after adoption of the Fourteenth Amendment (PA 167). This "close connection to the thirteenth amendment" convinced the court that it would be inappropriate to apply to §1981 the Fourteenth Amendment standard of intentional discrimination. However, the statute's Thirteenth Amendment lineage is no bar to adoption of an intent standard. In *Griffin v. Breckinridge*, 403 U.S. 88 (1971) this Court held §1985(3) to be a valid enactment pursuant to the Thirteenth Amendment, and at the same time held that "invidiously discriminatory animus" was a necessary element of a cause of action under that statute.

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[13]Act of May 31, 1870, Ch. 114, 16 Stat 140 (referred to hereafter as "the 1870 Act").

[14]The Addendum attached to this brief sets forth the language of these enactments.

Moreover, as the district court itself noted, the motivation for incorporating the 1866 Act into the 1870 Act was to anchor those statutory provisions firmly to the Fourteenth Amendment in the face of existing doubt that the Thirteenth Amendment afforded sufficient constitutional foundation. See *Davis v. County of Los Angeles,* 566 F.2d 1334, 1349 (Wallace, J., dissenting). Thus, Congress in 1870 intended more than the "simple reenactment" of the 1866 Act; it intended that the 1866 Act be interpreted consistent with the length and breadth of the Fourteenth Amendment. Indeed, the Third Circuit Court of Appeals, itself, has observed that

> [t]he fourteenth amendment was intended to embody the principles of the 1866 act . . . Thus, interpretation of the fourteenth amendment might well shed some light on the meaning of the 1866 act.

Mahone v. Waddle, 564 F.2d 1018, 1029, n.21 (3rd Cir. 1977). We submit that this Court's conclusion in *Washington v. Davis, supra,* that the Fourteenth Amendment imposes liability only for intentional discrimination sheds definitive light on the question of the appropriate evidentiary standard under §1981.

This interpretation is also supported by reference to the evil which Congress sought to remedy in 1866. Blacks were no longer slaves, but their status as freedmen had been rendered largely illusory by the "Black Codes" adopted by the state legislatures of the reannexed Confederacy. The Black Codes varied somewhat from state to state, but consisted of a series of laws and ordinances designed to keep the freedmen "in their place". The Congressional purpose in adopting the 1866 Act was to render such enactments unlawful. Heiser, *Intent v. Impact,* at 237-239. Some of these statutes explicitly singled out black persons for disparate treatment, while a few could be described as facially neutral.[15] However, it was clear to

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[15]Restrictive, but facially neutral, vagrancy laws are the most commonly cited example.

Congress that all of the statutes, whether or not facially neutral, had been adopted with the intent to deprive freed blacks of equal rights. *Croker v. Boeing Co., supra;* see Heiser, *Intent v. Impact,* p. 238. The "intentional discrimination" standard set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977), would permit, indeed require, a finding that the Black Codes were unlawful under the Fourteenth Amendment. Adherence to the same standard under §1981 does no violence to, and is consistent with, Congressional intent in enacting the 1866 Act.

The Court of Appeals for the Second Circuit recently examined the language and legislative origins of §1981 in *Guardians Association v. Civil Service Commission, supra,* and concluded:

> The legislative history of §1981 fails to convince us that the intent of the statute is more subtle than its language and structure would indicate . . . Objectively viewed, the language, structure and history of §1981 all point to the conclusion that the statute was simply intended to prohibit *purposeful racial discrimination* in a wide variety of circumstances, including but not limited to employment discrimination.

Id. at 701-703 (emphasis added).

C. *Section 1981 Is Separate, Distinct And Independent From Title VII And Title VII Standards Should Not Be Superimposed Onto Section 1981.*

It is obvious that §1981 is not simply a nineteenth century edition of Title VII. This Court has made it clear that

> the remedies available under Title VII and §1981, although related and although directed to most of the same ends, are separate, distinct, and independent . . . *Johnson v. Railway Express Agency, Inc.,* 421 U.S. at 461 (1975).

This alone would seem to refute the district court's conclusion that a §1981 claim "may be proven on roughly the same basis as a Title VII claim." Careful examination of the two statutes reinforces petitioner's position.

While §1981 and Title VII overlap, "[s]ection 1981 is not coextensive in its coverage with Title VII." *Johnson v. Railway Express Agency, Inc., supra.* There are important differences in the respective schema of Title VII and §1981:

Title VII focuses sharply on the single issue of employment discrimination.	§1981 sweeps broadly across the whole of contract law, and beyond, to encompass a wide range of civil rights.
Title VII is thorough, proscribes specific unlawful employment practices, and is augmented by a substantial body of regulations that give employers guidance in complying with the "disparate impact" formula, cf. 29 C.F.R. 1600 *et seq.*	§1981 is brief, general rather than specific, and is illuminated by no body of regulations.
Title VII creates a special administrative body and a formal administrative process for screening out frivolous or defective claims.	§1981 is administered only by the courts and is subject to no administrative procedures to screen out frivolous or defective claims.
Title VII imposes a uniform, and relatively short, statute of limitations.	§1981 is governed by limitations periods which differ from state to state and may be as much as six years.
Title VII remedies are limited to equitable, make-whole remedies, and recovery of back pay is generally limited to two years.	§1981 authorizes both legal and equitable remedies including compensatory and punitive damages not available under Title VII; and back pay is limited only by the applicable state statute of limitations.

Given these sharp differences between the two statutes, it is not only reasonable, but desirable, to erect a higher evidentiary threshold in §1981 actions. This is consistent with, indeed justifies, the more extensive remedies available under §1981. It will also serve the function of limiting the number of frivolous cases that reach court dockets, similar to the screening function played by Title VII's administrative procedures. *See, Davis v. County of Los Angeles,* 566 F.2d 1334, 1350 (9th Cir.) (Wallace, J. dissenting), *vacated as moot,* 440 U.S. 625 (1979).

The disparate impact concept sanctioned in *Griggs* is a sophisticated, second generation weapon for attacking discrimination. Indeed, the judicial imprimatur placed on the disparate impact theory in *Griggs* relied in large part on legislative history indicating that Congress in 1964 was clearly concerned about the potential disparate impact of otherwise facially neutral practices. *Griggs v. Duke Power Co.,* 401 U.S. 434-436. No such evidence appears in the legislative debates preceding the 1866 and 1870 Acts. *See, Racially Disproportionate Impact, supra* at 1279-1280; *Burden of Proof, supra,* at 1050-1053. To assume that this advanced concept was known or considered by nineteenth century legislators in enacting the 1866 and 1870 Acts would comport with neither a sense of history nor common sense.

Finally, it is clear that Congress did not intend to either contract or expand the rights and remedies afforded by §1981 when it enacted Title VII. *Johnson v. Railway Express Agency, Inc., supra.* In 1972, Congress specifically rejected an effort to preclude the application of §1981 to employment discrimination and to make Title VII the exclusive remedy in such cases. *Runyun v. McCrary,* 427 U.S. 160, 174 (1976). The record indicates that Congress intended to preserve the body of law which had developed under the Reconstruction Era statutes. *Burden of Proof, supra,* at 1048-1049. That body of law had almost exclusively applied a discriminatory intent standard. Brest, *The Supreme Court, 1975 Term — Forward: In*

Defense of the Antidiscrimination Principle, 90 Harvard Law Review 1, 27 (1976).

D. ***Present Day Interpretation Of §1981 and the Reconstruction Statutes Requires Adoption of An Intent Standard.***

It is the present-day interpretation of §1981 itself, rather than the present-day interpretation of Title VII, which must be considered. It is now settled that §1 of the 1866 Act is to be construed as governing private conduct. *Jones v. Alfred H. Mayer Co., supra* (§1982); *Johnson v. Railway Express Agency, supra* (§1981). Judicial decisions have extended its protective umbrella to cover a wide range of both private and state action.[16] In addition, §1981 governs the right to sue, to be a party to a legal proceeding, to give evidence, and to be subject to equal taxes, license provisions, and other exactions.

No basis is offered, nor does one appear, upon which an "impact only" standard might be applied to one or some of these rights and an "intent" standard to the others. *Guardians Association v. Civil Service Commission, supra,* at 266. In *Washington v. Davis, supra,* this Court observed that the application of the disparate impact standard to such a broad panoply of rights would

> raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more

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[16] *See, Hills v. Gautreaux,* 425 U.S. 284 (1976) (housing practices); *Cody v. Union Electric Co.,* 518 F.2d 978 (8th Cir. 1975) (utility security deposits); *Olzman v. Lake Hills Swim Club, Inc.,* 495 F.2d 1333 (2d Cir. 1974) (contract for admission to private recreation facility); *Jennings v. Patterson,* 488 F.2d 436 (5th Cir. 1974) (construction of road barricade); *United States v. Medical Society of South Carolina,* 28 F.Supp. 145 (D.S.C. 1969) (contract for medical care); *Ortego v. Merit Insurance Co.,* 433 F.Supp. 135 (N.D. Ill. 1977) (contract for insurance); *Grier v. Specialized Skills, Inc.,* 326 F.Supp. 856 (W.D.N.C. 1971) (contract for education).

> affluent white . . . extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

Washington v. Davis, supra, at 248.

The judicial expansion of §1981's scope and the evolution of the disparate impact theory have so far proceeded as two separate and distinct developments. As recognized by this Court in *Washington v. Davis,* the merger of these two trends would create a situation so volatile that its accomplishment by judicial fiat is inappropriate. As §1981 is accorded the broad scope appropriate to a statute vindicating constitutional rights, so it should be construed to measure conduct by the constitutional standard of purposeful discrimination.

This action arises from the private sector, but §1981, like the Fourteenth Amendment, extends to governmental action. Virtually any action which can be brought under the Fourteenth Amendment can also be brought under §1981. Consequently, one result of adopting an "impact only" standard for §1981 would be to effectively nullify this Court's holding in *Washington v. Davis,* because plaintiffs could "end run" the Fourteenth Amendment intent standard by pleading only §1981. *See, Guardians Association v. Civil Service Commission, supra,* at 268.

A number of §1981's companion statutes also derive from civil rights enactments of the Reconstruction Congress. It is appropriate therefore to consider the evidentiary standard which has been established for these statutes. For example, §1982 has precisely the same origins as §1981. This Court has not yet squarely faced the question of what evidentiary standard applies under §1982,[17] but has stated:

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[17] In *City of Memphis v. Greene,* ___ U.S. ___, 49 U.S.L.W. 3931 (April 20, 1981), *rehearing denied,* ___ U.S. ___, 49 U.S.L.W. 4389 (June 15, 1981), the question was presented, but the Court decided the case on other grounds. Justice White, concurring in the result, would have held that § 1982 is violated only by intentional discrimination.

> . . . the structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case — that §1 was meant to prohibit all *racially motivated* deprivations of the rights enumerated in the statute . . . *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (emphasis added).

In later holding that §1981 reaches private action, the Court referred to its prior holding in *Jones* in these terms:

> Just as in *Jones* a Negro's §1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser *solely because he was a Negro,* so also a Negro's §1 right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, *solely because he is a Negro,* the same opportunity to enter into contracts as he extends to white offerees.

Runyon v. McCrary, 427 U.S. 160, 170-171 (1976) (footnote omitted; emphasis added). It is difficult to imagine language more indicative of an intent requirement than Justice Stewart's formula that the conduct be motivated solely by racial considerations.

The Court's analysis of another companion civil rights statute, §1985(3), is also applicable to §1981. In *Griffin v. Breckinridge,* 403 U.S. 88 (1971), the Court declared that the reach of §1985(3) extended to private conspiracies entered into with the purpose of depriving persons of the equal protection of the law. It had been argued that extension of §1985(3) to private action would render the statute an unconstitutional intrusion by Congress into areas reserved to local governments. However, the Court found that:

> [t]he constitutional shoals that would lie in the path of interpreting §1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose — by requiring, as an element of the cause of action, the kind of invidiously discriminatory motiva-

> tion stressed by the sponsors of the limiting amendment. 403 U.S. at 102.

The matters addressed by §1981 — contracts, juries, capacity to sue — are also matters long reserved to local law, and §1981 can no more be construed as a general federal tort law than can §1985(3). As in *Griffin*, the answer to this objection is the requirement of proof of intentional discrimination. So construed, §1981, §1982, §1985(3), and the Fourteenth Amendment — all adopted shortly after the Civil War — achieve the legal symmetry of all requiring intentional discrimination as an essential element of any violation.

POINT II

The courts below erroneously substituted a vicarious liability standard of proof for the proper standard of intentional discrimination.

The error in the district court's vicarious liability theory is evident when it is tested by the true touchstone of a §1981 claim, namely, the discriminatory intent of the party held liable. Intent, being a state of mind, is necessarily personal. Thus, to impute intent to one individual from the acts of another defies logic as well as established legal concepts. The law cannot at the same time hold that §1981 renders one liable only for intentional discrimination, and at the same time impose liability where there is no intent to discriminate.

This court has recently had occasion to take the next step beyond *Washington v. Davis* and to describe the level of motivation which satisfies the constitutional standard of discriminatory intent. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). The Court said:

> '[d]iscriminatory purpose', however, implies more than intent as volition or intent as awareness of consequences. [citation omitted]. It implies that the decision

> maker . . . selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of', its adverse effects upon an identifiable group [footnote omitted]. 442 U.S. at 274.

This language leaves no room for the position adopted below that the defendant-employers could be held liable under §1981 in the complete absence of any evidence that they "selected or reaffirmed" any course of action "because of" its adverse effect on minorities. Stated in a different way, Local 542 engaged in purposeful discrimination and therefore was properly found in violation of §1981. Bechtel and the other unnamed employers did not engage in purposeful discrimination and therefore could not be found to have violated §1981.

Aside from its inconsistency with the concept of intent, the district court's reasoning is not supported by the authorities upon which it relied. Those authorities fall into three categories: employment discrimination cases, decisions under the National Labor Relations Act ("NLRA"), and cases interpreting the common law doctrine of *respondeat superior*.

A. *Imposition Of Vicarious Liability Is Contrary To Prior Employment Discrimination Cases.*

Few employment discrimination cases have addressed the issue of an employer's liability for racial discrimination in the hiring hall context. But where the issue has been confronted, the courts have uniformly determined that employers or their associations are not liable for a union's independent acts of discrimination. *Vogler v. McCarty, Inc.*, 294 F.Supp. 368, 374-75 (E.D. La. 1968), *aff'd sub nom. Heat & Frost Insulators and Asbestos Workers v. Volger*, 407 F.2d 1047 (5th Cir. 1969); *Allen v. Pipefitters Local Union No. 208*, 56 F.R.D. 473 (D. Colo. 1972); *McFadden v. Baltimore Steamship Trade Association*, 8 F.E.P. Cases 391 (D. Md. 1972).

The district court found these cases "unpersuasive" (PA 174). Instead, it relied upon a line of circuit court

decisions,[18] each of which presented essentially the same factual situation: an employer and union negotiated a collective bargaining agreement with seniority provisions which were facially neutral, but which, when applied according to their terms, had a disproportionately adverse impact on minorities (PA 182). In each of these cases, the court found that the seniority provisions in the labor agreement violated Title VII because of their adverse impact on minorities, and held both the union and the employer liable. On this point, the cited cases are now of doubtful authority, following this Court's delineation of *bona fide* seniority systems in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977). The district court nevertheless considered these cases support for the principle that "all parties to a collective bargaining agreement which by its terms has a discriminatory impact can bear civil rights responsibility." (PA 183).

The district court correctly summarized these authorities as involving "a collective bargaining agreement which *by its terms* has a discriminatory impact" (emphasis added). Here, however, the collective agreement "by its terms," i.e. if implemented by both parties as written, was *not* discriminatory. Disparate impact resulted not from application of the agreement as negotiated and written, but rather from the intentional departure from that agreement by Local 542. There is not the slightest suggestion in the record that the hiring hall agreement would have had a disparate impact if lawfully administered by Local 542. Accordingly, these cases relied upon by the district court are simply and clearly inapposite.

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[18] *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *cert. dismissed,* 434 U.S. 801 (1977); *Carey v. Greyhound Bus Co.*, 500 F.2d 1372 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Robinson v. Lorillard,* 444 F.2d 791 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971).

The court also read these "seniority provision" cases as establishing the principle that an employer has an " 'affirmative duty' to prevent discrimination" (PA 186). This principle is contrary to this Court's holding in *Furnco Construction Co. v. Waters,* 438 U.S. 567, 577 (1978), wherein it determined that an employer's duty is merely to refrain from engaging in discrimination; see also, Brief of United Engineers & Constructors Inc. Thus, even if the district court correctly stated the holdings of those cases, they have subsequently been overruled on this point by *Furnco, supra.*

B. *The Cases Arising Under The National Labor Relations Act Do Not Support the Imposition Of Vicarious Liability.*

The district court relied upon three circuit court decisions wherein orders of the National Labor Relations Board were enforced (PA 170).[19] In each case, the union had discriminated in work referrals on the basis of union membership (not race), in violation of the National Labor Relations Act ("NLRA"). In each, the employer whose workforce was affected was held liable for a violation of section 8(a)(3) of the NLRA, 29 U.S.C. §158(a)(3). Based on these decisions, the district court concluded that under the NLRA, employers are liable for a union's acts of discrimination regardless of whether the employer knew or should have known of such discrimination. It further concluded that the same rule should govern in a §1981 case.

We respectfully disagree with the court's interpretation of these decisions. In *Morrison-Knudsen,* the court of appeals stated that the employer clearly had some knowledge of the union's discriminatory acts, 275 F.2d at 917; in *H.K. Ferguson,*

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[19] *NLRB v. H.K. Ferguson Co.,* 337 F.2d 205 (5th Cir. 1964), *cert. denied,* 380 U.S. 912 (1965); *Morrison-Knudsen Co., Inc. v. NLRB,* 275 F.2d 914 (2d Cir. 1960), *cert. denied,* 366 U.S. 909 (1961); *NLRB v. United States Steel Corp.,* 278 F.2d 896 (3d Cir. 1960) *(en banc), cert. denied,* 366 U.S. 908 (1961).

the employer's unlawful activity was the "condoning or acquiescing in [the union's conduct]", 337 F.2d at 208; and in *United States Steel,* one of the employer's supervisory employees was instrumental in the union's unlawful activity, 278 F.2d at 898. In none of the cases was liability actually imposed upon an employer who had no knowledge of the union's actions. Further, at least two courts of appeals have expressly rejected the vicarious liability theory in the NLRA context. *NLRB v. Master Stevedores Association of Texas,* 418 F.2d 140 (5th Cir. 1969); *Lummus Co. v. NLRB,* 339 F.2d 728 (D.C. Cir. 1964).

Most significantly, no NLRA case cited by the district court remotely supports the expansive legal theory adopted in this action. In each cited case an individual employer or association was held liable under the NLRA only after proof that an identified person was denied an employment opportunity with *that* employer or association *because* of the union's illegal refusal to refer *that* person to *that* employer or association. We are aware of no decision where the NLRB has determined that an employer violated the NLRA simply by using the services of a hiring hall which discriminated generally in the industry. Absent a showing that the union's discrimination affected, in fact, the work force composition of a particular employer, that employer would not have violated the NLRA.

C. *The Common Law Doctrine Of Respondeat Superior Does Not Apply To The Circumstances Of This Case.*

The third and final leg supporting the district court's vicarious liability stool is the common law doctrine of *respondeat superior.* In its application of this doctrine, the court characterized the relationship between the employers and Local 542 as that of "master" and "servant," or at least "principal" and "agent" (PA 186). In so doing, the court ignored not only federal labor law, but also the realities of labor relations.

The *sine qua non* of an agency relationship, of course, is a right of control by the master or principal over the acts of the servant or agent. Restatement (Second) of Agency §1. The district court found that the employers posessed this right of control because they had the right to enforce the terms of the collective bargaining agreement (PA 192). Plainly, this reasoning is erroneous. Such a rule would transmute every contractual relationship into an agency relationship, a result both undesirable and uncontemplated by the common law.[20]

A second objection is the court's characterization of the 1400 contractors as a single master of the "servant" union. The court refers to the "potential collective capacity" of the employers (PA 192), and the "collective delegation" of the employment process by the "mass of employers collectively" (PA 195). This is, quite simply, not the real world. The "class" of employers had no collective or unified existence, no legally cognizable "being", until its certification by the court. The existence of multiple employer associations certainly is no evidence that the mass of 1400 employers moved with a single will, for the district court found that "relatively few" of the employers even belonged to the associations (PA 29). When a local contractor association signed an agreement with Local 542, it bound only its members to the use of the hiring hall. When Bechtel agreed with the International Union of Operating Engineers to use local hiring halls where they existed, it bound only itself. There is simply no basis in the record for finding that the class of 1400 employers collectively delegated anything to anybody.

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[20]Nor does the district court explain why the employers should have taken steps to enforce the agreement when the court also found that they neither knew nor should have known that it was being violated. Indeed, the ultimate irony is that following the district court's decision the local contractors *did* obtain an arbitration ruling that they were no longer contractually bound to the discriminatory hiring hall, and the district court vacated that award and ordered the contractors to continue exclusive use of the Local 542 hiring hall (JA 384).

The questions of control and delegation, then, are individual questions. There are myriad local agreements, national agreements and individual project agreements that must be examined to determine the true extent of any individual contractor's ability to exercise control over the union hiring hall. Not only may this degree of control vary from contractor to contractor within the class, but a particular contractor's degree of control may well vary from construction project to construction project. There are simply no findings from which it can be concluded that any individual class member exercised control over Local 542's hiring hall sufficient to make it the "master" of the hiring hall.

Furthermore, the National Labor Relations Act prohibits an employer from exercising the type of control over union operations that an agency relationship would require. *Lummus Co. v. N.L.R.B., supra.* Indeed, the very contention that a union is the servant of the employer with which it negotiates runs counter to the fundamental premise of the National Labor Relations Act, which is that the labor organizations formed by workers must remain independent of employer influence. Plainly, the district court's imposition of *respondeat superior* in these circumstances ignores the legal and economic balance of power fashioned by Congress and this Court in applying our federal labor laws.

D. *The Imposition of Vicarious Liability Under the Circumstances of This Case Jeopardizes the Stability of Collective Bargaining Throughout the Construction Industry.*

One result of the district court's holding is that a construction contractor who utilizes a union hiring hall becomes its guarantor and is *per se* liable under §1981 for any racially discriminatory referrals by the union. This is so even if the discriminatory referrals do not affect that contractor's workforce, but affect the workforce of another contractor, or affect

a universe of several hundred other contractors using that same hiring hall.

If the lower court decisions represent the law of the land, the only way a national contractor like Bechtel can escape liability for countless unknown, and unknowable, union violations of §1981 is to negotiate the deletion of hiring hall provisions from each of its national agreements and to resist such provisions in each locality where it is engaged. That, flat out, is a recipe for a labor relations war in the construction industry.

Bechtel's situation is not unique. Every contractor, large or small, having an exclusive hiring hall clause in its labor agreement faces the same dilemma.[21] These contractors could protect themselves only by eliminating the hiring hall requirement from their labor contracts. Yet, it can be said beyond peradventure of doubt that any such effort by contractors would be answered by the nation's construction trade unions with strikes and picketing. This is amply evident from the two strikes conducted by Local 542 to support its demand for a hiring hall agreement. The risk of widespread disruption of labor relations in the construction industry, at odds with our national labor policy of promoting peaceful collective bargaining, is sufficient reason alone to reject the vicarious liability theory adopted below.

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[21]Some 40 national agreements and 6,000 local agreements currently are in effect in the construction industry. U.S. Department of Labor, "Annual Construction Industry Report, April 1981", p. 12.

POINT III

By imposing classwide vicarious liability, the district court erroneously created for §1981 a lower threshold of liability than exists for Title VII.

Prior to the decisions below, it was uniformly recognized that §1981 required a standard of proof either greater than, or equivalent to, that required under Title VII. Thus, as described earlier, the prevailing view is that §1981 requires a showing of purposeful discrimination, whereas Title VII affords protection to discriminatees on a disparate impact theory, even in the absence of intent. The minority view has been that a violation of §1981, like Title VII, requires at least a showing of disparate impact, but no more. Yet, in the present case, Bechtel has been found liable for a violation of §1981 and subjected to a comprehensive mandatory injunction without a finding either that it purposefully discriminated or that its use of Local 542's hiring hall, in fact, caused a disparate impact on its own workforce.

There is no evidence in the record that Bechtel's workforce reflected a statistically significant disparity in the employment of minorities. Evidence of a class-wide disparity constitutes neither legal nor logical proof of a similar disparity in the workforce of Bechtel.[22] Absent evidence that some act of Bechtel's produced a statistical disparity in Bechtel's employment of minorities, the district court could not find that "racial discrimination was [Bechtel's] standard operating procedure — the regular rather than the unusual practice." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (footnote omitted). The absence of such a finding would bar liability under Title VII; if Title VII standards are to govern §1981, then the absence of such a finding must also bar liability

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[22]Similarly, statistical evidence that women as a class live longer than men as a class is not proof that an *individual* woman will experience the actuarily computed longevity. *See, City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978).

under §1981. Plaintiffs, quite simply, failed to establish a *prima facie* case of unlawful racial discrimination by Bechtel.

Consider the ramifications of the classwide vicarious liability theory applied by the district court. Under that theory, the employer is liable for a violation of §1981 where: (1) the use of a union hiring hall is required by a facially neutral provision of a labor contract, (2) the employer does not, and could not, know of the union's discriminatory operation of the hiring hall, and (3) the discriminatory hiring hall does not, in fact, result in racial imbalance in that employer's own work force.

Under this theory, an employer who hired but a single operating engineer through the Local 542 hiring hall during the period from 1965 to 1978 is personally liable under §1981 for compliance with the broad restraints of the injunction, even if the single operating engineer hired was a black.[23] Thus, the decisions below expand §1981 to the point where proof of *neither* intent *nor* disparate impact is required.

This is far, far beyond where any court has previously ventured in its interpretation of §1981. In fact, it is far beyond where any court has ventured in its interpretation of Title VII. After this Court's decisions in *Teamsters, supra,* and *Furnco, supra,* it is clear that an employer is only liable under Title VII if a plaintiff can demonstrate that discrimination has occurred and is manifest in some fashion in that employer's workforce. The decisions below dispense with this requirement.[24] In so

[23]In the case of one of the defendant-employer class members, Barger, Inc., summary judgment was denied and the employer subjected to the decree despite uncontradicted evidence that minorities constituted at least 50% of its workforce at all relevant times (JA 126).

[24]The decisions below also deprived absent class members of the defense that, for them, use of the hiring hall was a business necessity. *See, Griggs v. Duke Power Co., supra.* This defense was apparently not presented by Glasgow, perhaps because it is more typical of national contractors. *See,* Bastress, *Application of A Constitutionally-Based Duty of Fair Representation to Union Hiring Halls* 82 W.Va.L.Rev. 31, 47-48; Bourton and Levitt, *Union and Open Shop Construction,* at 62-63 (1980).

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doing, they redefine §1981 as a statute imposing not a higher standard of proof than that required by Title VII, or even an equivalent standard, but one that imposes a lesser standard of proof than that required by Title VII.

POINT IV

The defendant-employer class was improperly certified.

The district court's certification of the defendant-employer class is distinct, but not entirely separable, from its legal conclusions on liability. On the one hand, the court's abrogation of § 1981's intentional discrimination standard provided a shortcut through the requirements of Rule 23(a);[25] on the other hand, certification of the defendant class was the court's justification for imposing liability without regard to individual workforce statistics. The certification of the defendant-employer class, therefore, merits scrutiny.

It is well settled that a proposed class may only be certified if it satisfies the four mandatory requirements of Rule 23(a) and one of the three alternative categories of Rule 23(b). *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 163 (1974). In this case, (A) the defendant-employer class does not satisfy the "commonality" and "typicality" requirements of subdivisions (2) and (3) of Rule 23(a); (B) conflicts of interest preclude Glasgow from adequately protecting the interests of absent class members, as required by subdivision (4) of Rule 23(a); and, (C) as a matter of law, the district court erred when it certified the defendant-employer class pursuant to subdivision (2) of Rule 23(b).

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[25]Federal Rule of Civil Procedure 23 will be referred to herein simply as "Rule 23", with reference to appropriate subparts. The full text of Rule 23(a) and (b) appears in the Addendum.

A. *The Commonality and Typicality Requirements of Rule 23(a) Were Not Satisfied.*

Subdivisions (2) and (3) of Rule 23(a) require, respectively, that there be "questions of law or fact common to the class" and that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The district court considered these requirements to be no bar to certification of the defendant-employer class, because it viewed the sole issue in Stage I to be whether the contractors could be held vicariously liable for Local 542's acts of discrimination (PA 202).

If proof of discriminatory intent is required by § 1981, certification of the defendant class was clearly erroneous. Intent is an inherently subjective, and therefore individual, matter. Whether employer "A" had the requisite discriminatory intent is simply not a question in "common" with whether employer "B" also had the requisite intent. *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), (reversing certification of a defendant class of real estate brokers in an antitrust action). The district court acknowledged this when it held that plaintiffs' claim that the defendant-employers intentionally discriminated was "inapplicable in this defendant class context because of the individual questions presented." (PA 128). Consequently, a determination that § 1981 requires proof of discriminatory intent creates 1400 individual questions of fact, and renders certification of the defendant-employer class improper.

The district court also found that the defenses presented by Glasgow, the class representative, would be "typical" of the defenses each of the 1400 absent defendant class members would have presented. This conclusion was preordained by the court's wrongful denial to the employers of all individualized defenses to liability — circuitous reasoning of the highest

order. In particular, the court received no minority utilization figures for any contractor other than Glasgow. However, operating engineers are not employed by the defendant class, as such, or by "the industry"; they are employed by individual contractors. Evidence that Glasgow did or did not employ a representative proportion of minorities tells a court nothing about whether Bechtel employed a representative proportion of minorities. Without such a showing, liability cannot be imposed; conversely, the fact that such an individualized showing must be made renders the certification of the defendant-employer class erroneous as a matter of law.

B. ***Conflicts Between the Designated Class Representative and the Absent Class Members Render Class Certification Improper.***

Subdivision (4) of Rule 23(a) requires that the designated class representative "fairly and adequately protect the interests of the class." Stated another way, the class representative "must not have interests antagonistic to those of the class." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975).

The greatest interest of putative class members is their interest in not becoming members of a certified class. Here, the class representative never submitted an opposition to plaintiffs' motion to certify the defendant class, and never responded to the Memorandum filed by plaintiffs in October, 1976 in support of their position that a defendant class was proper. The class representative's failure to protect the interests of class members by not actively opposing certification bears strongly on the adequacy of the representation that those class members might expect to receive. *See East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) (discussing failure of named plaintiff to actively seek certification of a plaintiff class).

This early signal of conflict was amplified shortly after the district court issued its Judgment and Decree. The costs of implementing the decree (now over one hundred thousand dollars) were assessed by the district court against the named defendants (PA 283). Glasgow has consistently urged the district court to assess costs against the absent class members. Two of the consolidated appeals below found Bechtel opposing its "representative" Glasgow on this issue, and Bechtel currently has an appeal pending in the circuit court (No. 81-1514) relating to the assessment of costs. It would seem beyond argument that the interest of the absent class members lies in not being held liable for the amounts which Glasgow, their purported representative, seeks to have assessed against them. Such a patent conflict of interest compels the conclusion that Glasgow was not, and cannot, adequately represent the absent class members.[26]

C. *The Defendant-Employer Class Was Improperly Certified Under Rule 23(b) (2).*

The district court's certification of the defendant class under subdivision (b) (2) of Rule 23 was also improper. While it appears that certification of a *plaintiff* class under subdivision (b) (2) is appropriate in employment discrimination actions, few courts have carefully addressed whether (b) (2) certification is appropriate for a *defendant* class. It is evident from a plain reading of subdivision (b) (2) that it was not intended to govern defendant class actions; and for this reason, the Fourth Circuit Court of Appeals recently concluded that certification of a defendant class under subdivision (b) (2) is not appropriate. *Paxman v. Campbell,* 612 F.2d 848 (4th Cir. 1980) (*en banc*).

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[26] In advancing this argument, we intend no allegation, or inference, of impropriety on the part of counsel for Glasgow. Rather, the conflict complained of springs inevitably from the improper certification of the defendant class.

One reason for preferring such a result is illustrated by this case. Whereas the discretionary notice permitted under subdivision (b) (2) failed to afford all class members an adequate opportunity to defend their individual interests (see Point V, *infra*), the mandatory notice and opt-out procedures of subdivision (b) (3) would have protected these important due process interests of the absent class members.

For all these reasons, the district court erred in certifying the defendant-employer class. Regardless of this Court's resolution of the liability issue, the judgment below should be reversed to the extent that it found the defendant-employer class properly certified.

POINT V

A defendant class action does not confer upon the district court personal jurisdiction over absent class members; therefore, the mandatory obligations of the decree must be vacated as to the absent class members.

The district court first certified a defendant class of employers in March 1972 (JA 118). A legal notice was sent to known class members in December, 1973 (JA 121). Several employers used the Local 542 hiring hall for the first time after 1973; these employers became class members but never received any notice regarding this litigation. Although no absent class member was ever served with a summons and complaint, all are subject to personal liability for failure to comply with the terms of the decree.

The district court held that through the device of the defendant class action it obtained personal jurisdiction over the members of the defendant class sufficient to bind them to the terms of the injunctive decree (PA 212). In so holding, it relied exclusively on the following statement in *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940):

> members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . .

However, preceding the statement excerpted by the district court is this statement:

> Nevertheless, there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit. 311 U.S. at 42.

Thus, *Hansberry* should be read as holding only that defendant class members might be "bound" in the sense that the findings made in the class action would be *res judicata* as to the absent class members, if the class members were adequately represented.

This, we submit, is the proper scope of the defendant class action. Absent defendant class members in this case, for example, if adequately represented, might be bound by the *res judicata* effect of the district court's findings that Local 542 intentionally discriminated, that the collective bargaining agreement to which the defendant class members adhered was nondiscriminatory, and that the plaintiffs failed to prove that the defendant class members knew or should have known of Local 542's discrimination. Nothing in *Hansberry,* or any other decision of this Court, authorizes the imposition upon absent defendant class members of uniquely personal obligations such as employment quotas, training requirements, and reporting obligations. The procedural device of the defendant class action does not expand the courts' jurisdiction, nor can it override constitutionally-based due process considerations. *See Christopher v. Brusselback,* 302 U.S. 500 (1938). The misuse of the defendant class action as a shortcut to sweeping remedies, without regard for due process protections, should not be fostered.

A rule that absent defendant class members can be held personally liable may actually undermine the utility of the defendant class as a vehicle for judicial efficiency. Unnamed class members now have no obligation to appear, or to actively monitor the proceedings. See *Gonzales v. Cassidy*, 474 F.2d 67, 76 (5th Cir. 1973); *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 485, 489 (S.D.N.Y. 1973). A defendant class member may be willing to rely on a class representative if the risk is simply that the absent class member will be foreclosed from relitigating certain issues in the future. The absent class member may not be prepared to rely on the class representative if the risk is that the absent class member will be individually and personally bound by an onerous injunctive decree or monetary damages.[27] Raising the stakes in defendant class actions in this manner will encourage, perhaps compel, the active participation of unnamed class members. The result will be that a defendant class action will become unmanageable, with no substantial decrease in the need to process collateral attacks by defendant class members who remain absent from the original action. The judicial system will have lost, however, the ability to resolve in an efficient manner those issues that are truly "common" and "typical."

For these reasons, the judgment below should be reversed to the extent that it imposes upon the absent defendant class members personal liability for compliance with the mandatory injunctive decree.

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[27]The decree here involved only mandatory injunctive obligations; but the district court offered no principled rationale for distinguishing between the exercise of *in personam* jurisdiction for injunctive purposes, and exercise of *in personam* jurisdiction over absent class members for an award of damages. In either case, non-compliance is punishable as contempt.

CONCLUSION

For the foregoing reasons, Bechtel Power Corporation respectfully requests this Court to reverse the judgment of the court of appeals, and direct that the judgment and decree of the district court be vacated insofar as it applies to Bechtel and other unnamed members of the defendant-employer class.

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Respectfully submitted,

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ADDENDUM

Statutory Provisions and Rules Involved

42 U.S.C. § 1981 and § 1982

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

§ 1982 Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, sell, hold, and convey real and personal property.

Statutory Provisions and Rules Involved

§ 1 of the Civil Rights Act of 1866:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

Statutory Provisions and Rules Involved

§ 16 and § 18 of the Enforcement Act of 1879:

Sec. 16. And be it further enacted, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulations, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

Sec. 18. And be it further enacted, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

Statutory Provisions and Rules Involved

§ 1 of the Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions and Rules Involved

Subdivisions (a) and (b) of Federal Rule of Civil Procedure 23 provide:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually

controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.